LEE WONG YU & ORS

v.

THE OWNERS OF THE SHIP OR VESSEL "MV HUA HONG SATU"

HIGH COURT SABAH & SARAWAK, MIRI
HASAN LAH JC
[ADMIRALTY IN REM NO: 27-01-96 (MR)]
4 FEBRUARY 1999

SHIPPING: *Action in rem - Arrest of vessel - Whether claim gave rise to a maritime lien - Whether claim came under s. 20(2)(n) of the UK Supreme Court Act 1981 - Consideration of ss. 21(3) & (4) of UK Supreme Court Act 1981 and s. 24(b) of Courts of Judicature Act 1964*

SHIPPING: *Action in rem - Arrest of vessel - Whether s. 20(2)(n) of UK Supreme Court Act 1981 to be construed to include money advanced for the construction, design and planning of ship - Whether conditions under s. 21(4) thereof satisfied*

SHIPPING: *Action in rem - Arrest of vessel - Whether there was non-disclosure of material facts in affidavit leading to arrest - Effect on warrant of arrest*

WORDS & PHRASES: *"maritime lien"*

On 16 February 1996, the plaintiffs filed an admiralty action *in rem* against the defendant as creditor for a sum of RM507,300 being a loan the plaintiffs advanced to the defendant for the planning, construction and design of the vessel "M.V. Hua Hong Satu" ('the vessel'). The same day, the court issued a warrant of arrest against the vessel but it was only executed on 22 June 1996. Meanwhile on 21 June 1996, the ownership of the vessel was transferred to Belinau Sdn Bhd. On 3 July 1996, a bail bond was filed and the vessel released. The defendant applied for orders *inter alia* that the plaintiffs' action *in rem* and the warrant of arrest be set aside, the vessel be released and damages for wrongful arrest to be assessed.

The defendant submitted that the plaintiffs' claim did not give rise to a maritime lien and did not come under s. 20(2) of the UK Supreme Court Act 1981 ('the Act') as: (a) the plaintiffs had no right to invoke the admiralty jurisdiction of the court to arrest the vessel on 22 June 1996 as it had been sold on 21 June 1996; (b) the loan which was alleged to have been given in July/August 1994 could not have been for the construction of the vessel as it

was built in 1991 and its licence was granted in 1992; (c) the plaintiffs' claim did not come under s. 20(2)(n) of the Act. These apart, the defendant also submitted that the warrant of arrest should be set aside as there was a serious non-disclosure of material facts in the plaintiffs' affidavit leading to the arrest, in that the plaintiffs had failed to disclose a letter dated 7 February 1996 showing that the defendant had disputed the claim on the ground that it was an illegal money lending transaction.

The plaintiffs argued that (i) the claim was within the admiralty jurisdiction as it related to the construction and repair of the vessel and s. 20(2)(n) of the Act should be construed to include money advanced for the repair and construction of the ship; (ii) the defendant was the beneficial owner of the vessel as the defendant had submitted to the jurisdiction of the court when the defendant put up the bail bond; (iii) there was no non-disclosure of material facts.

Held:

[1] Section 21(3) of the Act provides that in any case in which there is a maritime lien or other charge on any ship, aircraft or other property for amount claimed, an action *in rem* may be brought in the High Court against that ship or property. Having considered the plaintiffs' claim, the claim does not give rise to a maritime lien since it does not fall under any of the five categories recognised in English law, namely: (i) damage done by a ship; (ii) salvage; (iii) seamen's wages; (iv) bottomry and respondentia; and (v) Master's wages and disbursements. As such the provision of s. 21(3) of the Act does not apply to the plaintiffs' claim.

[2] It is not probable that the said money was lent by the plaintiffs for the construction of the vessel as the money was given about two years after the ship's licence had been granted. If the loan was given in 1991 or 1992, the plaintiffs' claim, which is based on a loan not made in writing, would have been time barred under Item 38 of the Schedule to the Sarawak Limitation Ordinance.

[3] Money advanced for the construction of a ship can be claimed under s. 20(2)(n) of the Act. However, a claim under this section does not automatically entitle the claimant to bring an action *in rem*. The conditions stated in s. 21(4) of the Act must be satisfied before the claimant can bring an action *in rem* against the vessel.

[4] The plaintiffs' action does not fall under s. 21(4)(i) of the Act as at the time when the action was brought, by which is understood to mean at the time the writ was served and the warrant of arrest was executed on

the vessel, the beneficial owner of the vessel was Belinau Sdn Bhd and not the defendant *in personam*. As such, even if it is proved that the plaintiffs' claim comes under s. 20(2)(n) of the Act the plaintiffs are not entitled to bring an action *in rem* against the vessel.

[5] The failure of the plaintiffs to disclose the contents of the letter dated 7 February 1996 does not amount to non-disclosure of material facts which could affect the issue of the warrant of arrest.

[6] There is no substance in the plaintiffs' contention that the defendant had submitted to the jurisdiction of the court by putting up the bail bond.

[7] The defendant has not shown that the plaintiffs had malice in arresting the vessel. The plaintiffs' motive was simply to obtain security for their claim and they did that by invoking the admiralty jurisdiction and bringing an action *in rem* against the vessel. In the premises, the defendant is not entitled to damages for the execution of the warrant of arrest against the vessel.

[Action in rem struck out. Warrant of arrest set aside, vessel released and bail bond cancelled.]

Case(s) referred to:
Borneo Company v. "Mogileff" And Freight [1921] Lloyds Law Report 528 ***(refd)***
Evmar [1989] 2 MLJ 460 ***(refd)***
Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd [1997] 2 CLJ 104 ***(refd)***
Janagi v. Ong Boon Kiat [1971] 2 MLJ 196 ***(refd)***
Kherson [1992] 2 LLR 261 ***(refd)***
The Banco [1971] 1 LLR 137 ***(foll)***
The Dong Nai [1996] 4 MLJ 454 ***(refd)***
The Euroexpress [1988] 3 MLJ 367 ***(foll)***
The Fairport (No 5) [1967] (2) Lloyds Law Report 162 ***(foll)***
The Santorini 1 [1994] 3 MLJ 709 ***(refd)***
The Vasso [1984] 1 LLR 235 ***(refd)***
Walter Turnbull & Ors v. The Owner of the ship "Strath Navner" the Cargo and Freight [1875] 1 AC 58 ***(refd)***
Xenos v. Aldersley [1858] XII Moore 352 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 24(b)
Rules of the High Court 1980, O. 12 r. 7, O. 70 r. 4(1), (7)(b), O. 92 r. 4

Supreme Court Act 1981 [UK], ss. 20(2)(n), 21(2)(n), (m), (3), (4)(i)

Other source(s) referred to:
Admiralty Jurisdiction and Practice, Nigel Meeson, pp 70, 71

For the plaintiffs - Orlando SW Chua; M/s Wong, Orlando Chua & Co
For the defendant - Albert Tang; M/s Wan Ullok, Jugah, Chin & Co

Reported by Cindy Chan

JUDGMENT

Hasan Lah JC:

Introduction

By this summons in chambers dated 10 July 1996 the defendant is applying for the following orders:

(i) that the action *in rem* be struck out or set aside.

(ii) that the warrant to arrest dated 16 February 1996 and executed on 22 June 1996 be set aside, and that the vessel "Hua Hong Satu" be released.

(iii) that damages for wrongful arrest be assessed.

(iv) that the defendant be given leave to file and serve the defence if required fourteen (14) days after the determination of this application.

(v) that costs of this application be costs in the cause.

(vi) any further or other orders as this Honourable Court may deem fit.

This application is made under O. 12 r. 7, O. 70 r. 4 and O. 92 r. 4 of the Rules of the High Court 1980.

The following affidavits were filed by the defendant in relation to this application:

(a) Affidavit of Wong Lim Lee affirmed 10 July 1996.

(b) Affidavit of Wong Pak Sing affirmed on 7 August 1996.

(c) Affidavit of Wong Pak Sing affirmed on 29 August 1996,

(d) Affidavit of Wong Pak Tung affirmed on 29 August 1996.

(e) Affidavit of Lee Kheng Chin affirmed on 29 August 1996.

The plaintiffs in opposing this application have filed and are relying on the following affidavits:

(a) Affidavit of Ling Heng King affirmed on 27 July 1996,

(b) Affidavit of Ling Heng King affirmed on 21 August 1996,

(c) Affidavit of Lau Siew Poh affirmed on 21 August 1996,

(d) Affidavit of Lau Siew Poh affirmed on 19 August 1997.

The chronological order of events in this admiralty suit so far as is relevant to this application has been adequately set out by the learned counsel for the defendant his written submission as follows:

(a) 16 February 1996	The plaintiffs took out an admiralty action *in rem* against the defendant as creditor for a sum of RM247,700, continuing interest on the sum of RM247,700, at the rate of 8% per annum from the date of judgment until full settlement and costs.
(b) 16 February 1996	Mr Victor Wong, the then learned counsel for the plaintiffs affirmed an affidavit – leading to the warrant of arrest.
(c) 16 February 1996	The learned senior assistant registrar issued a warrant of arrest against the ship "Hua Hong Satu". The warrant remained unexecuted for several months.
(d) 21 June 1996	Ownership of vessel "Hua Hong Satu" transferred to Belinau Sdn. Bhd.
(e) 22 June 1996	The vessel "Hua Hong Satu" was arrested at Sejinkat anchorage, near Kuching.
(f) 2 July 1996	The plaintiffs amended the writ by increasing the sum claimed from RM247,700 to RM507,300.
(g) 2 July 1996	The plaintiffs filed its statement of claim.
(h) 25 June 1996	The defendant filed an application for leave to enter conditional appearance.
(i) 25 June 1996	The defendant entered conditional appearance.
(j) 3 July 1996	Bail bond filed.
(k) 9 July 1996	The plaintiffs consented to the release from arrest of the vessel.
(l) 9 July 1996	Release from arrest issued by the court.

(m) 10 July 1996 The defendant filed an application to set aside the action *in rem*.

The admiralty jurisdiction of the High Court is derived from s. 24(b) of the Courts of Judicature Act 1964 which provides that the civil jurisdiction of the High Court shall include the same jurisdiction and authority in relation to matters of admiralty as is had by the High Court of justice in England under the United Kingdom Supreme Court Act 1981 (hereinafter referred to as "the said Act"). It is to be noted that the admiralty jurisdiction of the High Court has been set out under ss. 20 and 21 of the said Act.

The procedures governing the admiralty proceedings is also set out under O. 70 of the Rules of the High Court. The provisions regarding the invocation and exercise of the court's power are to be found in O. 70 r. 4(1) of the Rules of the High Court 1980, which reads:

> After a writ has been issued in an action *in rem*, a warrant in Form 156 for the arrest of the property against which the action or any counterclaim in the action is brought may, subject to the provisions of this rule, be issued at the instance of the plaintiff or of the defendants, as the case may be.

The plaintiffs' indorsement of claim as per the amended writ of summons dated 2 July 1996 is as follows:

> The Plaintiffs' claim as Creditor of the owner of the ship or vessel "M.V. Hua Hong Satu" and the following:
>
> (a) The sum of RM507,300.00
>
> (b) continuing interest on the sum of RM507,300.00 at the rate of 8% per annum from the date of judgment until full settlement and
>
> (c) costs.

Paragraph 1 of the plaintiffs' statement of claim dated 2 July 1996 reads:

> The Plaintiffs' claim is for money lent to the Defendant without interest the sum of RM507,300.00 for the planning, construction and design for the ship or vessel "M.V. Hua Hong Satu".

It was submitted by the learned counsel for the defendant that the plaintiffs' alleged claim as indorsed in the writ and as per the statement of claim does not give rise to a maritime lien.

Section 21(3) of the said Act provides that in any case in which there is a maritime lien or other charge on any ship, aircraft or other property for amount claimed, an action *in rem* may be brought in the High Court against that ship or property. The concept of maritime lien has been clearly stated in *Admiralty Jurisdiction And Practice* by Nigel Meeson at pp 70 and 71 as follows:

The maritime lien is a concept peculiar to maritime law. As regards certain maritime claims the ship or other property in respect of which the claim arises is charged with that claim, the maritime lien being that "charge", so that the maritime lien can be enforced by an action *in rem* in whosoever's hands the property may be. The classic definition of a maritime lien was provided by Sir John Jervis in The "Bold Buccleugh" where he said:

> Having its origin in the rule of the civil law, a maritime lien is well defined by Lord Tenterden, to mean a claim or privilege upon a thing to be carried into effect by legal process and Mr. Justice Story explains that process to be a proceeding *in rem* and adds, that wherever a lien of claim is given upon the thing, then the Admiralty enforces it by a proceeding *in rem*, and indeed is the only court competent to enforce it ... This claim or privilege travels with the thing into whosoever's possession it may come. It is inchoate from the moment the claim or privilege attaches, and, when carried into effect by legal process by a proceeding *in rem*, relates back to the period when it first attached.

There are numerous other judicial definitions in similar terms.

The claims which give rise to maritime liens

Only a limited class of maritime liens are recognised in English law. In The "Bold Buccleugh" four categories were listed:

(i) damage done by a ship;

(ii) salvage;

(iii) seamen's wages;

(iv) bottomry and *respondentia.*

To these must be added a fifth, statutory category:

(v) Master's wages and disbursements.

Having considered the plaintiffs' alleged claim as indorsed in the writs and as stated in the statement of claim I hold that the plaintiffs' claim does not give rise to maritime lien since it does not fall under any of the five categories of the claim mentioned above. As such the provision of s. 21(3) of the said Act does not apply to the plaintiffs' claim.

The next issue to be determined is whether the provision of s. 21(4) of the said Act applies to the plaintiffs' claim. That s. 21(4) reads:

> In the case of any such claim as is mentioned in section 20(2)(e) to (r), where –

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action *in personam* ("the relevant person") was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship,

an action *in rem* may (whether or not the claim gives rise to maritime lien on that ship) be brought in the High Court against –

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

In this connection it was submitted by the learned counsel for the defendant that the plaintiffs are attempting to ground their admiralty claim on s. 20(2)(n) of the said Act. According to the learned counsel for the defendant the plaintiffs' claim does not come under s. 20(2) of the said Act on the following grounds:

(1) The plaintiffs no longer had any right to invoke the court's admiralty jurisdiction to arrest the said ship on 22 June 1996 as it had been sold on 21 June 1996.

(2) The loan which was alleged by the plaintiffs to have been given in July or August 1994 could not have been given for the construction of "Hua Hong Satu" as the ship was built in 1991 and its licence was granted in 1992.

(3) The plaintiffs' claim does not come under s. 20(2)(n) of the said Act.

(4) The warrant of arrest should have been set aside as there was a serious non-disclosure of material fact in the plaintiffs' affidavit leading to the arrest.

In reply to that the learned counsel for the plaintiffs submitted that:

(1) The plaintiffs' claim is within the admiralty jurisdiction of this court as it relates to the construction and repair of the vessel "Hua Hong Satu". According to the learned counsel s. 20(2)(n) of the said Act ought to be construed so as to include the money advanced for the repair and construction of the vessel. In support of that the learned counsel cited the case of *The Fairport (No. 5)* [1967] (2) Lloyds Law Report 162 and *Borneo Company v. "Mogileff" And Freight* [1921] Lloyds Law Report 528.

(2) The defendant *in personam* was the beneficial owner of the vessel at the time the writ was filed in February 1996.

(3) The defendant had submitted to the jurisdiction of this court when the defendant put up the bail bond with the letter of undertaking with a clear promise to pay any amount that may be adjudged against the defendant and further agreed that the said guarantee shall continue until final disposal of the action.

(4) There was no non-disclosure of the material facts in the plaintiffs' affidavit leading to the arrest.

Whether The Plaintiffs' Claim Comes Under S. 20(2)(n) Of The Said Act

Section 20(2)(n) of the said Act reads:

> Any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues.

The plaintiffs' indorsement of claim in the amended writ of summons dated 2 July 1996 states that the plaintiffs' claim as creditor of the owner of the ship or vessel MV HUA HONG SATU ... and para (1) of the plaintiffs' statement of claim dated 27 June 1996 reads:

> The Plaintiffs' claims is for money lent to the Defendant without interest the sum of RM507,300.00 for the planning, construction and design for the ship or vessel "M.V. Hua Hong Satu".

From para. 5(b) of the affidavit of Ling Heng King, the second plaintiff, affirmed on 21 August 1996 it is the clear that the loan was given sometime in July or August 1994 of after that. However in para. 8(d) of the affidavit of Wong Pak Sing, the Managing Director of Messrs Wong Liong Kong & Sons Sdn. Bhd. affirmed on 7 August 1996 it was stated that the said vessel was built in Sibu in 1991 and was granted the licence to sail on 11 September 1992. This is supported by the ship's licence No. 326533 (WPS I) dated 11 September 1992. Since the plaintiffs are alleging that the money was lent for the construction of the ship only and not for the repair or equipment of the vessel the court will only decide the issue based on the pleading ie, whether the money was lent for the construction of the ship only (see *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196). The court will not consider the counsel for plaintiffs' submission that the money was also lent for the repair of the ship.

Having considered the affidavit evidence in respect of this matter I hold that it is not probable that the said money was lent by the plaintiffs for the construction of the vessel as the money was given about two years after the ship's licence has been granted. It is common knowledge that the licence can only be issued after the ship has been completely built. If the loan was given in 1991 or 1992 the plaintiffs' claim, which is based on a loan not made in writing, would have been time barred under item 38 of the schedule to the Sarawak Limitation Ordinance.

Assumming that I am wrong in my finding based on the affidavit evidence as stated above I will now consider whether the plaintiffs' claim for money lent for the planning, constructions and design of the vessel "Hong Hua Satu" comes under s. 20(2)(n) of the said Act as contended by the learned counsel for the plaintiffs.

The plaintiffs contend that their claim falls within s. 20(2)(n) of the said Act, and that the court should construe the section to include money advanced for the construction, design and planning of the ship. The court was referred to the case *The Fairport (No. 5)* 1967 (2) Lloyds Law Report 162. In that case, the court had to deal with the word "necessaries" and it was submitted that s. 20(2)(n) could and would include money advanced for the construction of the ship by logical extension of *The Fairport (No. 5)* case. Mr Justice Brandon held in that case that there was authority that the word "necessaries" covers payments made by way of advances to enable necessaries to be purchased and that being the case a similar construction should be given to sub-para (m). Counsel had in that case submitted that as a general principle money advanced for necessaries was deemed to be necessaries. Likewise in the case of *Borneo Company v. "Mogileff" And Freight* [1921] Lloyd Law Report 528. Mr. Justice Hill in his judgment at p. 529 did state that monies advanced for the procuring of necessaries stand on the same footing as necessaries supplied.

I entirely agree with the proposition of law as expounded in *The Fairport (No. 5)* case and in the case of *Borneo Company v. "Mogileff" And Freight* that monies advanced for the procuring of necessaries stand on the same footing as necessaries supplied. Applying that principle of law to the present case it means that money advanced for the construction of a ship can be claimed under s. 20(2)(n) of the said Act.

The plaintiffs in para. 1 of their statement of claim state that the claim is for money lent to the defendant for the planning, construction and design of the ship or vessel M.V. Hua Hong Satu. It would seem that the plaintiffs are entitled to claim under s. 20(2)(n) of the said Act. However it must be noted that a claim under s. 20(2)(n) does not automatically entitle the claimant to bring an action *in rem.* The conditions stated in s. 21(4) of the said Act must be satisfied before the claimant can bring an action *in rem* against the vessel.

It is my view that in the present case the plaintiffs have not satisfied one of the conditions laid down under that s. 21(4) for the reasons given below.

When Is The Jurisdiction Invoked?

The plaintiffs took out an admiralty action *in rem* against the defendant on 16 February 1996 and on the same day the Senior Assistant Registrar issued a warrant of arrest against the vessel "Hua Hong Satu". On 21 June 1996 the ownership of the vessel was transferred from Wong Liong Kiong & Sons Sdn Bhd to Belinau Sdn Bhd, the applicant in this application. On 22 June 1996 the vessel was arrested. It is clear from these facts that at the time the writ was filed the vessel belonged to the *in personam* defendant, Wong Liong Kiong & Sons Sdn Bhd but when the vessel was arrested the vessel was already transferred to the present applicant, Belinau Sdn Bhd.

Under s. 21(4) of the said Act it is provided that an action *in rem* may be bought against a ship if at the time when the action is brought the person who would be liable on the claim in an action *in personam* is the beneficial owner of the ship. There is a similar provision under O. 70 r. (7)(b) of the Rules of the High Court 1980. The difference in the two provisions is only that in s. 21(4)(i) of the said Act the words used are "at the time when the action is brought" but in O. 70 r. 7(b) of the Rules of the High Court the words used are "at the time of the issue of the writ'.

In *The Banco* [1971] 1 LLR 137 Lord Denning MR had said at p. 153 para. F that:

> Where a plaintiff brings an action *in rem*, the jurisdiction is invoked, not when the writ is issued, but when it is served on the ship and the warrant of arrest is executed. The reason is because it is an action *in rem* against the very thing itself: and does not take effect until the thing is arrested.

In the same case Megaw LJ had made a similar observation at pp. 158 and 159:

> However, I do not think that the premise is right. I do not accept that the admiralty jurisdiction is invoked by an action *in rem* against a vessel merely by the issue of a writ which contains, *inter alia,* the name of that ship. I agree with counsel for the defendants that, for the purposes of this subsection, the jurisdiction is not invoked merely by the issue of the writ. That may be the start of the invocation, but the invocation is not complete until the writ is served, or, it may be, deemed to have been served as a result of the entry of appearance by the defendant before service is affected.

In the present case even though the writ was filed in February 1996 the service of the writ and the execution of the warrant of arrest were only made on 22 June 1996. However on 21 June 1996 Belinau Sdn. Bhd. became the registered sole owner of the vessel. Belinau Sdn. Bhd. is not the defendant *in personam* of the plaintiffs' claim. In the light of the decision of Lord Denning MR and Megaw LJ in *The Banco* that in an action *in rem* the jurisdiction is

invoked when the writ is served on the ship and the warrant of arrest is executed it is my judgment that in the present case the plaintiffs' action does not fall under s. 21(4)(i) of the said Act as at the time when the action is brought, by which I understand it to mean that at the time the writ was served and the warrant of arrest was executed on the vessel "Hua Hong Satu", the beneficial owner of the vessel was Belinau Sdn. Bhd. and not the defendant *in personam*, Wong Liong Kiong & Sons Sdn. Bhd. As such even if it is proved that the plaintiffs' claim comes under s. 20(2)(n) of the said Act the plaintiffs are not entitled to bring an action *in rem* against the vessel.

Non-Disclosure Of Material Facts

It was submitted by the learned counsel for the defendant that the affidavit of Victor Wong Lit Fah affirmed on 16 February 1996 lending to the warrant of arrest of the vessel failed to disclose an important letter dated 7 February 1996 from Messrs Kadir, Wong & Lin, the then counsel acting for the defendant. This letter, according to the learned counsel for the defendant, if disclosed would show that the defendant disputes the alleged claim on the ground that it is an illegal money lending transaction. The learned counsel submitted that this is a serious non-disclosure of material fact and he urged the court to set aside the warrant of arrest.

In reply to that it was submitted by the learned counsel for the plaintiffs that the failure to disclose the said letter does not amount to non-disclosure of material fact. In support of that the learned counsel cited the case of *Evmar* [1989] 2 MLJ 460 and the case of *Santorini 1* [1994] 3 MLJ 709.

In *The Vasso* [1984] 1 LLR 235 an affidavit was sworn to lead the warrant of arrest but no mention was made therein of the fact that the parties had entered into an arbitration agreement or that the arbitration was being actively pursued. The vessel was subsequently arrested but it was later released after an undertaking was given. The respondents issued a notice of motion asking for a declaration that the admiralty jurisdiction of the High Court should not and could not be invoked by an action *in rem* against the vessel and that the vessel ought not to have been arrested and that the security be released. The Court of Appeal held that on the law at present the court's jurisdiction to arrest a ship in an action *in rem* should not be exercised for the purpose of providing security for an award which might be made in arbitration proceedings. With regard to the affidavit Robert Goff LJ had this to say at p. 243:

> It is axiomatic that in an *ex-parte* proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex-parte* application, even though the facts were such that, with full disclosure, an order would have been justified ... In our judgment, exactly the same applies

in the case an *ex-parte* application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the court.

In the "*Kherson*" [1992] 2 LLR 261 the defendant *inter alia* applied for the warrant of arrest of the vessel to be set aside on the ground that the plaintiffs were not justified in obtaining such warrant and that on the *ex parte* application for the arrest of *Kherson* there had not been full disclosure of all material facts. It was held by court that the plaintiffs had failed to make full and frank disclosure in their affidavit sworn in support of the *ex parte* application to arrest the vessel in that they had omitted to exhibit a telex from the defendants' solicitor in which the defendants set out the reasons for contending that it would be wrong to arrest the vessel.

However in *The Evmar* [1989] 2 MLJ 460, which is a Singapore case, it was held that there was no material non-disclosure by the mere fact that the affidavit to lead the warrant of arrest did not disclose that there was an arbitration clause on the bill of lading. In that case the defendants claimed that the warrant should be set aside as the affidavit sworn did not disclose material facts, namely the presence of an arbitration clause on the bill of lading for the cargo and the parties were negotiating for a letter of undertaking *in lieu* of arrest.

In the local case of *The Santorini I* [1994] 3 MLJ 709 VC George J held that the non-disclosure of the fact that there were negotiations and attempts to mitigate the damage were not material to the issue of a warrant of arrest.

On the basis of the authorities cited above it is my judgment that the failure of the plaintiffs to disclose the contents of the letter dated 7 February 1996 does not amount to non-disclosure of material facts which could affect the issue of the warrant of arrest. The nature of the plaintiffs' claim as stated in the said affidavit is for money lent and advanced to the defendant for the construction of the said vessel. What was said in that letter dated 7 February 1996 was merely an allegation by the defendant that it was an illegal money lending transaction. That letter did not contain any evidence to support the defendants' allegation.

Submission To The Court's Jurisdiction

It was submitted by the learned counsel for the plaintiffs that the fact that the defendants had put up the bail bond had portrayed to this Honourable Court that they were submitting to the jurisdiction of this court.

In reply to that the learned counsel for the defendants submitted that the point relating to the submission to the jurisdiction has been taken up before Elizabeth

Chapman JC on 14 May 1997 and on 23 May 1997 where the objection was dismissed. There was no appeal against the ruling and as such the principle of *res judicata* applies. Secondly, according to the counsel, when the bail bond was given they informed the plaintiffs' solicitor that the bail bond was given without prejudice to the defendant's right to make application for the setting aside.

In view of what was submitted by the learned counsel for the defendants I hold that there is no substance in the plaintiffs' contention on this issue (see *Hartecon JV Sdn Bhd & Anor v. Hartela Contractors Ltd* [1997] 2 CLJ 104; [1996] 2 MLJ 57).

Damages For Wrongful Arrest

The learned counsel for the defendant submitted that the plaintiffs have been acting with *mala fides* in arresting the vessel. According to him in procuring the arrest, the motive of the plaintiffs is other than for the purpose of bringing justice to the dispute of the case.

In reply to that the learned counsel submitted that the defendant is not entitled to any damage for the execution of the warrant of arrest against the vessel on the following grounds:

(1) The defendant did not put up the bail bond to prevent the execution of the said warrant after being informed that a warrant of arrest had been issued against the said vessel.

(2) The defendants have not shown what form of damage have been suffered, if any.

(3) The defendants have not proved *mala fides* or *crassa negligentia* on the plaintiffs' part.

It is trite law that the defendant is only entitled to damages if the defendant can show that there was *mala fides* or *crassa negligentia* which might imply malice on the part of the plaintiffs in arresting the vessel (see *Walter Turnbull & Ors. v. The Owner of the ship "Strath Navner" the Cargo and Freight* [1875] 1 AC 58, *Xenos v. Aldersley* [1858] XII Moore 352). In *The Dong Nai* [1996] 4 MLJ 454 Abdul Malik Ishak J had this to say at pp. 465 and 466:

> Now, way back in 1858 in the case of *The Evangelismos* [1858] 12 Moo PC 352, the Privy Council laid down the principle that damages for wrongful arrest may be awarded only in case where there is either *mala fides* or *crassa negligentia* implying malice on the part of the arresting party. What constitutes *mala fides* or bad faith for an arrest of a ship has been outlined in *The Euroexpress* [1988] 3 MLJ 367 to mean that 'there must be some element in

the arrester's conduct, for example, where the arrest is in relation to a malicious claim, or is of itself malicious, apart from the proper enforcement of his claim'. In the *Borag* [1981] 1 WLR 274. the English Court of Appeal held that there was *mala fides* on the part of the arresting party in effecting the initial arrest of the vessel. It must be pointed out that the conduct of the ship managers in *The Borag* in arranging for the vessel to proceed to the Port of Limassol where the vessel was arrested was held to be 'contrary to the letter and spirit' of the management agreement between the ship managers and the shipowners. In the context of the present case, when the *Dong Nai* was arrested at Pasir Gudang Port and remained arrested therein, then the appropriate test to be applied to determine whether there is wrongful continuance of the arrest is the same as that applicable to wrongful arrest, namely, *mala fides* or *crassa negligentia* implying malice. There is a plethora of cases on this point. Suffice for me to quote a few of them, namely, *The Margaret Jane* [1869] 20 LT 1017; *The Cheshire Witch* [1864] 11 LT 350 and *The Saqr Jubail* as reported in the Lloyd's Maritime Law Newsletter of 14 March 1985. The word 'malice' according to Baron Alderson in *Stevens v. Midland Counties Railway Co* [1854] 10 Exch 352 at page 356 ought to bear the same meaning as it bears in an action for malicious prosecution, namely, 'any motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice'. When the plaintiffs successfully secured the arrest of the *Dong Nai*, they knew that they had to pay for the costs of the shore cranes; they also knew that they requested for the change of the discharge port at Pasir Gudang from Port Klang and, finally, they also knew that there was no claim made or will be made by the shippers and/or consignors against them for the sum of US$42,500. On this scenario, surely malice had been established against the plaintiffs.

In the present case it is my view that the defendants have not shown that the plaintiffs have malice in arresting the vessel. The affidavits do not disclose that there was any malice on the part of the plaintiffs. In fact the plaintiffs had informed the Director of Marine in Labuan and all the parties concerned before the execution of the warrant of arrest on the vessel that an admiralty action and a Warrant of Arrest had been issued against the vessel. The plaintiffs' motive was simply to obtain security for their claim and they did that by invoking the admiralty jurisdiction and bringing an action *in rem* against the vessel. In this connection Wee Chong Jin CJ was made the following observation in *The Euroexpress* [1988] 3 MLJ 367 at p. 371:

Claimants are entitled to arrest a vessel or other such property as is permitted to obtain security for the claim. It cannot be argued that the arrest is made in 'bad faith' merely because there is good defence to the claim. In our opinion, for an arrest to be in 'bad faith', there must be some element in the arrester's conduct, for example, where the arrest is in relation to a malicious claim, or is of itself malicious, apart from the proper enforcement of his claim.

In the premises I hold that the defendant is not entitled to any damage for the execution of the warrant of arrest against the vessel.

Conclusion

For the reasons given above I make the following orders:

(a) that this action *in rem* be struck out.

(b) that the warrant to arrest dated 16 February 1996 and executed on 22 June 1996 be set aside and that the vessel "Hua Hong Satu" be released.

(c) a consequential order that the bail bond given by WHH Credit & Mortgage Sdn Bhd dated 2 July 1996 and the solicitor's undertaking given to the plaintiffs in connection with the bail bond cancelled.

(d) cost of this application to be paid to the defendant.

Section 21(3) of the said Act provides that in any case in which there is a maritime lien or other charge on any ship, aircraft or other property for amount claimed, an action *in rem* may be brought in the High Court against that ship or property. The concept of maritime lien has been clearly stated in *Admiralty Jurisdiction And Practice* by Nigel Meeson at pp 70 and 71 as follows.